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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARIPIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR.,
Petitioners,

vs.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The facts are largely set out in the opinion of the Kansas Supreme Court, 191 Kan. 293, which is printed as Appendix D to the petition for the Writ.

An ordinance regulating and licensing pinball machines was enacted on November 16, 1961, by the City of Kansas City, Kansas. Since pinball machines are attractive to minors and easily adaptable to organized gambling, the City Commissioners provided in the ordinance that a pinball machine could not be licensed in a place of business that also had a current federal gaming stamp. Most of the plaintiffs are tavern operators.

The trial court held the ordinance unconstitutional for the reason that §2(d) was a deprivation of the constitutional rights of the tavern operators under the fourteenth amendment and for the further reason that §3(c) constituted an illegal delegation of legislative power.

The Kansas Supreme Court, in its unanimous opinion of April 6, 1963, reversed the trial court and held the ordinance constitutional.

I.

QUESTIONS PRESENTED

A. May a City Prohibit the Operation of Pinball Machines Easily Adaptable to Gambling Without Showing They Are in Fact Used for Gambling?

B. May the City Set Up Possession of a Federal Stamp As a Conclusive Criterion for Denial of a License?

C. Does the Phrase, "Good Moral Character," Need Any Further Legislative Standards or Guidelines?

II.

REASONS FOR DENYING THE WRIT

A. A City May Prohibit the Operation of Pinball Machines Easily Adaptable to Gambling Without Showing They Are in Fact Used for Gambling.

Petitioners argue that the pinball ordinance has had the effect of denying licenses to individuals whose pinball machines and their operations are perfectly legal. (Petition, p. 8) While we have serious doubt as to the correctness of petitioners' assertion, it is clearly within the City's police power to prohibit *all* pinball machines, without determining the "legality" of their operation. If the City Commissioners reasonably believed that pinball machines are inherently harmful or offensive to the public, or that gambling is being conducted thereon, they could ban them altogether, regardless of type or description. *Murphy* v. *California*, 225 U.S. 623 (1912).[1]

Petitioners argue that it is unfair to not allow a pinball operator some reasonable opportunity to prove that he is not in violation of state anti-gambling laws. But if the City can completely prohibit all pinball machines, it

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1. Under Kansas law, a city anti-gambling law may go beyond the State law if it does not conflict with a state statute. The Supreme Court of Kansas held in *City of Wichita* v. *Stevens*, 167 Kan. 408, 207 P.2d 386 (1949), that the City of Wichita had the authority to prohibit by ordinance the possession of punch boards even though such punch boards were in warehouses and not being used for gambling. The Court said at page 413:

"Under such an ordinance there was no occasion to determine as a question of fact whether punch boards were or were not gambling devices. In any event, they were an instrument which the city determined was detrimental to the peace and welfare of the City and within its police power the city may prohibit possession of them."

can certainly classify and legislate against those machines which are most likely to lead to the abuse against which it is legislating. In declaring a city ordinance valid which prohibited all persons from maintaining a room where pool or billiard tables were kept, but permitted hotels to provide such a room for their guests, this court in *Murphy* v. *California*, 225 U.S. 623 (1912), held:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." (pp. 628-29)

That not all participants in an activity deemed to be susceptible to abuse in fact engage in such abuse does not prevent the prohibition of the activity. It is the *possibility*, not the *presence*, of abuse which warrants the proscription. Compare *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), where this Court upheld a Kansas statute prohibiting debt adjusting despite petitioner's contention that he as an *honest* debt adjuster, was unconstitutionally deprived of his right to engage in his calling.

Before passing Ordinance 43040, the City Commissioners determined the strong likelihood that gambling was being conducted on pinball machines for which the $250 federal tax was paid, and they seek by the enforcement of the ordinance to curb this illegal activity. This regulation is well within the City's police power and the Com-

missioners are not obliged to give pinball operators classified in the ordinance a procedural opportunity to prove that they have not, in fact, violated any Kansas anti-gambling law.

B. The City May Set Up Possession of a Federal Stamp As a Conclusive Criterion for Denial of a License.

Because of the possibility and probability that pinball machines may be used for gambling, due process is not violated when the City denies a license for the operation of all machines on which a current federal gaming stamp is paid. The governing body can reasonably believe that devices which the federal government sees the necessity of taxing as gaming devices are more likely to be adaptable to gambling, and use the fact of possession of a federal tax stamp as conclusive proof that the machine is adapted or adaptable to gambling.

Certainly the governing body is equally concerned about the pinball operator who permits gambling on machines for which no current federal stamp has been paid. A license will be denied the non-federal tax stamp holder by the City for proven gambling operation.

But under the terms of the federal statute (68A Stat. 531, 26 U.S.C. §4461), certain pinball machines have been determined to be readily adaptable to gambling, and the legislative body of the City could reasonably believe that pinball operators would not purchase the federal stamp unless their devices were of the character that would require the stamps. Therefore, the Commissioners might well conclude that it is not necessary to examine a particular device to determine whether it is readily adaptable to gambling where the federal government has already required a gaming stamp.

C. The Phrase, "Good Moral Character," Needs No Further Legislative Standards or Guidelines.

The Court below held that the function of the Chief of Police under the ordinance to determine whether the applicant is of "good moral character" is purely ministerial. He is vested with no discretion, but only the duty to ascertain this one fact. By such construction of the ordinance, this Court is, of course, bound.

The only question is whether the crucial phrase is so vague and indefinite as to be unadministrable. We point out that it has long appeared in that exact form in the federal immigration laws, currently 66 Stat. 242, 8 U.S.C. 1427 (a) (3). In *United States* v. *Macintosh*, 283 U.S. 605, 616 (1931), this Court referred to "the *fact* of good character." (Emphasis the court's.) This is a fact which has been determined by federal courts in countless cases with no further legislative guides. Some difficulty has been experienced, to be sure, but the determination has been made.

Similarly the phrase appears in numerous licensing statutes. In Kansas alone the requirement appears for Embalmers (G.S. Kan. 1949, 65-1701); Nurses (G.S. Kan. 1949, 65-1115); Dentists (G.S. Kan. 1949, 65-1426); Optometrists (G.S. Kan. 1949, 65-1505), as amended by 1961 Supp.; Barbers (G.S. Kan. 1949, 65-1811), as amended by 1961 Supp.; Cosmetologists (G.S. Kan. 1949, 65-1902), as amended by 1961 Supp.

The boards administering each of these acts successfully determine as a day-to-day routine matter whether applicants have "good moral character." The lack of further standards has never been regarded as any obstacle to the performance of their duties.

Most common of all, perhaps, is the requirement as relating to attorneys at law. See G.S. Kan. 1949, 7-102. Even this Court requires of its practitioners that "their private and professional characters shall appear to be good." (Rule 5(1))

In all these instances a phrase is employed without elaboration because it is in common use and generally understood. That is all that is required to guide a ministerial officer in performing his delegated duties.

CONCLUSION

It is respectfully urged that the petitioners raise no substantial federal question in their petition which would entitle them to invoke the jurisdiction of the Court.

Respondent respectfully moves that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas be denied.

Respectfully submitted.

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